Supreme Court, U.S.
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No. 97-382

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAVID T. SABLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court is required to determine the extent of a departure from the Sentencing Guidelines by analogy to other Guidelines provisions.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-20a) is reported at 114 F.3d 913. The panel opinion of the court of appeals (Pet. App. 21a-28a) is reported at 90 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1997. The petition for a writ of certiorari was filed on September 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under an information filed in the United States District Court for the District of Guam, petitioner pleaded guilty to one count of maliciously damaging

a post office with an explosive, resulting in injury to persons, in violation of 18 U.S.C. 844(f) (1988).[1] He was sentenced to 20 years' imprisonment, to be followed by 60 months of supervised release. He was also ordered to pay restitution in the amount of $19,928.72. A panel of the court of appeals vacated the sentence and remanded for resentencing. Pet. App. 21a-28a. On rehearing en banc, the court of appeals affirmed the sentence imposed by the district court. *Id.* at 1a-20a.

1. On November 12, 1993, a friend gave petitioner a live hand grenade and told him to throw it inside the headquarters of the local police department in order to divert attention while the friend robbed a nearby store. Petitioner instead threw the grenade into the police parking lot adjacent to the local post office. The grenade bounced off a car and rolled toward several individuals, including a woman who was nine

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[1] At the time of the offense, Section 844(f) read, in pertinent part:

> Whoever maliciously damages * * * by means of fire or an explosive, any building * * * in whole or in part owned, possessed, or used by * * * the United States * * * shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results * * * shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both[.]

18 U.S.C. 844(f) (1988). Between the time of the offense and sentencing, Section 844(f) was amended to increase the maximum terms of imprisonment from ten years to twenty years for damage to government property, and from twenty years to forty years for injuries resulting to third parties. The maximum possible fines were increased as well. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320106(1), 108 Stat. 2111.

months pregnant. The blast injured five people, three of them severely. In addition, flying shrapnel damaged several cars and the exterior wall of the post office. Pet. App. 2a.

Petitioner pleaded guilty to territorial charges in Guam Superior Court. Pet. App. 3a. Under the territorial plea agreement, petitioner was to serve ten years' imprisonment, and that sentence was to run concurrently with any federal sentence that might be imposed. Petitioner thereafter pleaded guilty in federal district court to a one-count information that charged him with injuring persons by maliciously damaging a post office in violation of 18 U.S.C. 844(f) (1988). The government agreed to recommend a ten-year sentence. Pet. App. 3a.

Consistent with that agreement, the government moved for an 11-level upward departure based on the very serious injuries to three of the victims of the explosion. Pet. App. 3a, 32a. The district court agreed that an upward departure was warranted, but departed upward 16 levels, rather than 11, and imposed the statutory maximum of 20 years' imprisonment. *Id.* at 3a.

The court explained that the departure was based primarily on the injuries to the victims of the explosion:

> * * * Ann C. Mendiola still has shrapnel inside her body, still experiences numbness and pain in her bones in the area where the shrapnel remains; and for three weeks after the blast incident she had difficulty sleeping, and she had nightmares about the blast.
>
> Ms. Mildred Isimang was nine months pregnant; she had four shrapnel wounds to her back; one on

> her buttocks, one on her left arm, one near her left ear, two shrapnel wounds in each leg. And she stated that delivering her baby was hell because it was very difficult since she couldn't lie on her back; the labor lasted seven hours which was the longest she had experienced. And she still has shrapnel in her body and experiences numbness and pain where indicated.
>
> Mr. Toves had to have surgery, because of shrapnel injuries to the stomach area. He had the through and through perforation of the ileum, with perforation of the right transverse column, laceration of the omentum, and right perineal histoma. And because of his injuries he had to use 300 hours of sick leave to recuperate.

Pet. App. 32a-33a. The court found that "there's just too much suffering endured by these people." *Id.* at 35a. The court also relied on several other factors to support the extent of the departure, including that the victims "actually saw the grenade rolling towards them, before exploding, and injuring them," *ibid.*, that there was significant property damage, *id.* at 36a, and that there were unrecovered grenades in the locality, which created a greater need for deterrence than usual, *id.* at 34a-36a.

2. A panel of the court of appeals vacated the sentence and remanded for resentencing. Pet. App. 21a-28a. The panel held that "the district court abused its discretion by failing to establish the degree of the departure by analogy to other Guidelines provisions." *Id.* at 25a. The panel rejected the government's argument that the district court's 16-level departure could be justified by reference to the 6-level increase in the aggravated assault Guideline for permanent or life-

threatening bodily injury, adjusted to take into account the number of victims. *Ibid.* The panel concluded that an analogy to the aggravated assault Guideline was inappropriate because "[t]here was no evidence that [petitioner] intended to injure any of the bystanders." *Ibid.* The panel concluded that the 6-level increase for permanent or life-threatening injury in the Robbery and Extortion Guidelines provided an appropriate analogy. *Id.* at 26a. While the court acknowledged that a further increase would be permitted to take into account the number of victims, it concluded that a 16-level upward departure could not be justified on that theory. *Ibid.* The panel also held that the district court abused its discretion by relying on the need for deterrence as a departure ground. *Id.* at 26a-27a.

3. While neither the government nor petitioner sought rehearing, the court of appeals nonetheless reheard the case en banc and affirmed the district court's judgment. Pet. App. 1a-20a. The court held that each of the factors identified by the district court, including the additional need for deterrence, was a permissible ground for a departure. *Id.* at 9a-11a.

The court also held that the extent of the district court's departure was not unreasonable. Pet. App. 9a-12a. In reaching that conclusion, the court overruled its en banc decision in *United States* v. *Lira-Barraza*, 941 F.2d 745 (1991), which had held that a district court must determine the extent of a departure by analogy to other Guidelines provisions. Pet. App. 12a. The court stated that "in light of *Koon* [v. *United States*, 116 S. Ct. 2035 (1996)], we now reject such a mechanistic approach * * * and hold that where, as here, a district court sets out findings justifying the

magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed." *Ibid.* The court made clear that its holding "should not be interpreted as prohibiting the district courts from considering the possible relevancy of analogous guidelines." *Id.* at 12a n.10. Instead, "[a]n analysis and explanation by analogy, per *Lira-Barraza*, may still be a useful way for the district court to determine and explain the extent of departure, but it is not essential." *Ibid.*

Five judges dissented. Pet. App. 13a. The dissenting judges concluded that *Koon* did not affect *Lira-Barraza's* requirement that the extent of departure must be analogized to other Guidelines categories. *Id.* at 14a-15a. The dissenters also concluded that "deterrence is not a permissible ground for departure." *Id.* at 16a.

ARGUMENT

Petitioner contends that review should be granted to resolve a conflict in the circuits on whether a district court is required to determine the extent of a departure by analogy to other Guidelines provisions (Pet. 6-19). Only two circuits, however, have addressed that issue since *Koon*; the conflict between those circuits is a narrow one and may not be of much practical importance; and the Sentencing Commission is best positioned to decide whether further guidance should be provided on the appropriate method for determining the extent of a departure. Review by this Court is therefore not warranted.

1. The court below held that, under *Koon*, district courts are not required to analogize to other Guidelines provisions in determining the extent of a depar-

ture. As long as a district court's explanation for the extent of departure is not "unreasonable," its sentence must be affirmed. Pet. App. 12a. That holding conflicts only with the Seventh Circuit's decision in *United States* v. *Horton*, 98 F.3d 313, 317-319 (1996). There, the Seventh Circuit reaffirmed its requirement that district courts must determine the extent of a departure by analogy to other Guidelines provisions, rejecting the contention that such a requirement is inconsistent with *Koon*. *Ibid.* The rest of the circuits, however, have not addressed the impact of *Koon* on the question whether a district court must gauge the extent of a departure by reference to other Guidelines provisions. Thus, even if the issue otherwise warranted this Court's review, it would not be ripe for review at this time. That issue should be allowed to percolate in the regional courts of appeals.

Petitioner contends (Pet. 7) that the issue is ripe for review, because the decision below also conflicts with the departure standards established in the Second, Third, and Tenth Circuits. Even before *Koon*, however, those circuits did not impose an absolute requirement that district courts analogize to other Guidelines provisions; they all recognized the possibility that departures could be shown to be "reasonable" in other ways. For example, in *United States* v. *Campbell*, 967 F.2d 20, 26-27 (1992), the Second Circuit affirmed a district court departure decision that had not relied on an analogy to other Guidelines provisions, but had relied instead on Congress's recent increase in a statutory maximum. The Second Circuit held that, once a district court has "ma[d]e clear on the record how [it] determined the magnitude of the departure[,] * * * the only question that remains is whether the departure is reasonable in light

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of the justification given." *Id.* at 27. In *United States* v. *Kikumura*, 918 F.2d 1084, 1113 (1990), the Third Circuit emphasized that "[t]here may be vehicles for making offense-related departures * * * other than * * * analogic reasoning," and it noted that district courts have a "superior vantage point" for developing such alternatives. And in *United States* v. *O'Dell*, 965 F.2d 937, 938-939 (1992), the Tenth Circuit upheld an upward departure despite the district court's failure "to explain the specific degree of departure by providing some method of analogy, extrapolation or reference to the sentencing guidelines." The court of appeals simply concluded that the extent of the departure was "clearly reasonable." *Id.* at 939.

Petitioner also errs in contending (Pet. 16) that the Second, Third, and Tenth Circuits have applied an analogy requirement in the wake of *Koon*. In the cases cited by petitioner, those circuits simply held that it is *permissible* to determine the extent of a departure by analogy to other Guidelines provisions. *United States* v. *Malpeso*, 115 F.3d 155, 170 (2d Cir. 1997); *United States* v. *Baird*, 109 F.3d 856, 872 (3d Cir.) cert. denied, 118 S. Ct. 243 (1997); *United States* v. *Collins*, 122 F.3d 1297, 1309 (10th Cir. 1997). Those cases did not address the question whether the extent of a departure *must* be determined through analogies, much less analyze whether *Koon* affects the correct resolution of that question. Because only the Seventh and Ninth Circuits have specifically addressed the impact of *Koon* on the question presented by petitioner, that question is not ripe for review.

2. Review is also unwarranted because the conflict between the Ninth and Seventh Circuits is relatively narrow and may not have much practical importance. Although the court below held that analogies are not

required, it made clear that district courts may still rely on analogies to explain the extent of a departure. Pet. App. 12a n.10. Moreover, since the decision below, the Ninth Circuit reversed a district court departure decision because the extent of the departure was not shown to be "reasonable" through analogies or otherwise. *United States* v. *Mathews*, 120 F.3d 185, 188-189 (1997). Analogies are therefore likely to continue to play a significant role in determining the extent of departures in the Ninth Circuit. At the same time, while petitioner refers to the Seventh Circuit's standard as an analogy *requirement*, he concedes (Pet. 15) that there will be cases in which there is no obvious analogy, requiring district courts to exercise judgment that is independent of the Guidelines. Thus, district courts in both the Seventh and Ninth Circuits are likely to rely on a combination of analogies and judgment to decide upon the extent of a departure. The conflict between the circuits may therefore turn out to be of little practical significance.

Petitioner contends (Pet. 17) that the conflict between the Seventh and Ninth Circuits will generate "obvious and unwarranted disparities." Petitioner relies only on the present case, however, to support that conclusion. He does not identify any body of experience that suggests that will be so. The First Circuit, for example, has applied a pure "reasonableness" standard for some time. *United States* v. *Diaz-Villafane*, 874 F.2d 43, cert. denied, 493 U.S. 862 (1989). Petitioner does not show that, with respect to the same departure factors, the extent of departure in the First Circuit differs radically from the extent of departure in the Seventh Circuit.

Even the present case does not assist petitioner's argument. While petitioner claims (Pet. 17) that he would have received a ten year sentence if there were an analogy requirement, his calculation (Pet. 4 n.7) is based only on one of the district court's departure grounds. Petitioner's calculation does not take into account that a further upward departure could be justified because the victims actually saw the grenade rolling towards them before exploding, there was additional property damage, and there were unrecovered grenades in the locality. Pet. App. 34a-36a. Moreover, petitioner's assertion depends on the assumption (Pet. 4 n.7) that the presence of three victims would support only an additional three-level departure, a position that even the panel opinion did not adopt. Pet. App. 26a. It is therefore far from clear that petitioner necessarily would have received a significantly different sentence if there were an analogy requirement.

There is also little basis for petitioner's apparent assumption that an analogy requirement is capable of eliminating disparity in the extent of departures. As already noted, there will be cases in which there is no useful analogy. Moreover, as petitioner recognizes (Pet. 15), there will also be cases in which there is more than one reasonable analogy, and in such cases the district court will be free to select the appropriate analogy. Indeed, petitioner cites a case (*ibid.*) in which an analogy approach left the district court with discretion to sentence a defendant to as little as 27 and as much as 262 months' imprisonment. Whatever its virtues, an analogy requirement is not a panacea for disparity.

3. Finally, this is an area in which it is appropriate to defer to the expertise of the Sentencing Commis-

sion. The Commission has the ability to determine whether the difference in approaches between the Seventh and Ninth Circuits leads to unacceptable disparities, and to devise appropriate solutions. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Commission has already set standards to guide the extent of departures from criminal history categories. See Guidelines § 4A1.3 (Policy Statement). The Commission would have the authority to establish standards to guide offense level departures if its experience demonstrated that such guidance would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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